

**Local 31, International Union of Bricklayers and Allied Craftsmen, AFL-CIO and Local 580, International Brotherhood of Teamsters, AFL-CIO. Case 7-CA-32343**

December 16, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

Upon a charge filed by the Charging Party Union on September 18, 1991,<sup>1</sup> the General Counsel of the National Labor Relations Board issued a complaint on October 29 against Local 31, International Union of Bricklayers and Allied Craftsmen, AFL-CIO, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file a timely answer.

On December 9, the General Counsel filed a Motion for Default Summary Judgment, with exhibits attached. On that same day, the Respondent filed an answer to the complaint and a brief in opposition to the General Counsel's motion, with supporting affidavits. On December 13, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 27, the Respondent filed a brief in response to the Board's Notice to Show Cause and in opposition to the General Counsel's motion. On January 10, 1992, the General Counsel filed an answer to the Respondent's response to the Notice to Show Cause. On January 20, 1992, the Respondent filed a reply to the General Counsel's answer to the former's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Default Summary Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint itself states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be deemed to be admitted true and may be so found by the Board." It is undisputed that the Respondent failed to file an answer within the allotted time. Further, exhibits attached to the Motion for Default Summary Judgment indicate that the Regional Attorney for Region 7, by certified letter dated November 19, notified the Respondent's counsel that, unless an answer was received by November 29, a Motion for Default Judgment would be

filed.<sup>2</sup> An answer was not filed until December 9, after the Respondent received the General Counsel's Motion for Default Judgment.

The Respondent asserts that the failure to file a timely answer, was the result of "simple inadvertence." It also denies refusing to accept service of the November 19 warning letter. Relying on the concurring opinion of Chairman Stephens in *Odaly's Management Corp.*, 292 NLRB 1283, 1286 (1989), the Respondent contends that equitable considerations should lead the Board to accept the proffered untimely answer and to deny the Motion for Default Summary Judgment on the basis of factual issues allegedly raised by that answer.

Contrary to the Respondent, we find that the Respondent's failure to file a timely answer has not been supported by a showing of good cause. Even assuming that the Respondent's counsel did not receive the November 19 warning letter, such a letter is not required by the Act or the Board's Rules. Although the advisory guidelines of the Board's Casehandling Manual do provide for a reminder letter, the failure of a Regional Office to warn a respondent prior to issuance of a default summary judgment motion does not excuse the antecedent failure to file a timely answer.<sup>3</sup> In addition, the Board has held that informal statements of position in response to a charge, such as the one the Respondent submitted prior to the complaint's issuance here, are insufficient to constitute answers to the complaints.<sup>4</sup> The Respondent's "good cause" defense to the General Counsel's motion is therefore reduced to the bare claim of "simple inadvertence" by its counsel, an admittedly experienced labor law practitioner. In light of the complaint's clear notice that the Respondent must file a timely answer, the bare claim of unexplained inadvertence does not constitute good cause for the Respondent's late filing.<sup>5</sup> We therefore decline to accept the answer that the Respondent filed in response to the Motion for Default Summary Judgment.<sup>6</sup>

<sup>2</sup>In response to counsel's denial of receipt of the November 19 warning letter, the General Counsel has submitted as an exhibit a copy of a document indicating that the Postal Service returned the letter, which was properly addressed to the Respondent's counsel, marked "unclaimed."

<sup>3</sup>*Superior Industries*, 289 NLRB 834, 835 (1988).

<sup>4</sup>*Wheeler Mfg. Corp.*, 296 NLRB 6 (1989).

<sup>5</sup>See *Frank J. Foronjy & Sons Electric Corp.*, 304 NLRB 486 (1991) (failure of respondent's prior attorney to record properly new date for filing answer did not constitute good cause); *Father & Sons Lumber*, 297 NLRB 437 (1989) (allegations that respondents' attorney had unspecified breakdown of staff communication and responsibility did not constitute good cause); *U.S. Telefactories Corp.*, 293 NLRB 567 (1989) (heavy workloads of respondent's attorneys and illness of one attorney did not constitute good cause); *Sherwood Coal Co.*, 252 NLRB 497 (1980) (claim that counsel was delinquent in reviewing the case did not constitute good cause).

<sup>6</sup>This result is consistent with Sec. 102.111(c) of the Board's Rules and Regulations. That section became effective on October 28,

<sup>1</sup>Unless otherwise specified, all dates are in 1991.

In the absence of good cause for the failure of the Respondent to file a timely answer, we grant the General Counsel's Motion for Default Summary Judgment.

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a labor organization, is now, and has been at all times material, an unincorporated association with a place of business in Lansing, Michigan, where it is engaged in the business of representing employees in bargaining with employers with respect to wages, hours, and conditions of employment. During the 12-month period ending on December 30, 1990, the Respondent, in the course and conduct of its operations, collected and received dues, initiation fees, and benefits in excess of \$50,000, and remitted from its Lansing, Michigan facility to the Washington, D.C. facility of the International Union of Bricklayers and Allied Craftsmen, AFL-CIO dues, initiation fees, and benefits in excess of \$50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Teamsters Local 164 and Teamsters Local 580 are labor organizations within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

On or about mid-July, August 19, and September 17, Respondent's business manager, Daryl Hollenbach, threatened employee Susan Schrader that she would be faced with strict enforcement of working rules, a decrease in working hours, and loss of her job if she transferred her loyalties from Teamsters Local 164 to Teamsters Local 580. On or about September 13, Hollenbach reduced Schrader's working hours from 40 to 32 hours a week. This conduct by the Respondent was taken in retaliation for Schrader's preference for Local 580 rather than Local 164.

We find that, by the acts and conduct described above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act as alleged.

## CONCLUSION OF LAW

By interfering with, restraining, and coercing an employee in the exercise of her Section 7 rights, and by discriminating in regard to the terms and conditions of employment of an employee because of her union preferences, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of

1991, prior to the relevant events in this case. For the reasons set forth above, we do not believe that the Respondent's neglect was "excusable." Accordingly, without reaching the issue of whether "undue prejudice" to opposing parties would result from acceptance of the Respondent's tardy answer, we believe that there is no showing of "good cause" to support acceptance of that answer.

Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to restore Susan Schrader to a 40-hour workweek and to make her whole for any wages and benefits lost as a result of the unlawful reduction of hours, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

## ORDER

The National Labor Relations Board orders that the Respondent, Local 31, International Union of Bricklayers and Allied Craftsmen, AFL-CIO, Lansing, Michigan, its officers, agents, and representatives, shall

### 1. Cease and desist from

(a) Threatening to enforce working rules strictly against employees, decrease their working hours, or eliminate their jobs because of their union preferences.

(b) Reducing the work hours of employees because of their union preferences.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the 40-hour workweek for Susan Schrader, and make her whole for any losses resulting from the unlawful reduction of her working hours, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Lansing, Michigan, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN STEPHENS, concurring.

The Respondent has argued that, under the test I proposed in my concurring opinion in *Odaly's Management Corp.*, 292 NLRB 1283, 1286 (1989), the Board should deny the General Counsel's Motion for Summary Judgment in this case. The short answer to this argument is that the Board has not adopted that test and, under clear Board precedent, including cases subsequent to *Odaly's* in which I joined, the Respondent loses. But even taking into account the concerns that led me to concur separately in *Odaly's*, I would grant the General Counsel's motion.<sup>1</sup>

In *Odaly's*, borrowing the approach taken by an appellate court in *Livingston Powdered Metal v. NLRB*, 669 F.2d 133, 136 (3d Cir. 1982), I proposed the following analytical framework for determining whether to grant what is in essence a default judgment: (1) decide whether the Respondent has a meritorious defense; (2) if so, decide whether the Respondent's failure to meet an answer deadline was "the result of willfulness or inexcusable neglect, or whether, by contrast, it was the product of excusable neglect or simple inadvertence," and (3) deny the Motion for Default Judgment *either* if the Respondent's failure was owing to mere inadvertence or excusable neglect *or* if the prejudice to the Charging Party and the General Counsel was minimal and the Respondent's conduct, although possibly an instance of inexcusable neglect, could not be characterized as evincing "a clear disregard or contempt for the Board's procedures." The Respondent contends that its failure to file a timely answer was a matter of "simple inadvertence and some confusion" and that the General Counsel has shown no prejudice resulting from the Respondent's late filing of the answer. It therefore contends that the General Counsel's motion should be denied.

In light of the arguments made by the Respondent and the General Counsel, I have reconsidered some of the statements made in my *Odaly's* concurrence. In particular, I would no longer recognize an intermediate category between "willfulness" and excusable neglect, i.e., require the General Counsel to show prejudice of the kind established in *Odaly's* if the Respondent's tar-

diness were inexcusable but less than willful. I recognize that whether or not a Respondent's late answer causes delay of a scheduled hearing, the General Counsel has nonetheless been put to the trouble of filing a Motion for Summary Judgment, and it is not unfair to place on the Respondent some burden of explanation for its failure to meet the deadline.<sup>2</sup> Here the Respondent has provided no explanation other than a vague reference to "inadvertance" and "confusion." I find that insufficient to excuse the Respondent's late filing.

<sup>1</sup>None of the respondents in *Frank J. Foronjy & Sons Electric Corp.*, 304 NLRB 486 (1991); *Father & Sons Lumber*, 297 NLRB 437 (1989); *U.S. Telefactores Corp.*, 293 NLRB 567 (1989), specifically invoked the analysis of my *Odaly's* concurrence, so I had no occasion to consider its application in those cases.

<sup>2</sup>It might be worthwhile for the Board to consider devising measures, short of default judgment, to be taken against late-filing respondents that would encourage litigants to be mindful of the Board's rules without depriving parties of their day in court. The Board might, for example, explore its authority to entertain a motion from the General Counsel for imposition of the Agency's costs in the filing of a summary judgment motion. No such framework currently exists, however, and this might be a matter on which the Board would want first to seek public comment.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to enforce working rules strictly against our employees, decrease their working hours, or eliminate their jobs because of their union preferences.

WE WILL NOT reduce the work hours of our employees because of their union preferences.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the 40-hour workweek for Susan Schrader, and WE WILL make her whole for any losses resulting from the unlawful reduction of her working hours, with interest.

LOCAL 31, INTERNATIONAL UNION OF  
BRICKLAYERS AND ALLIED CRAFTSMEN,  
AFL-CIO